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No. 25

IN THE

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
FILED
MAR 26 1969
JOHN F. DAVIS, CLERK

FREDERICK T. ZUBER, ET AL.,
Petitioners,

v.

RUSSELL ALLEN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF VERMONT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of Vermont, pursuant to Rule 42 of the Rules of this Court, respectfully submits that the petition of Frederick T. Zuber, *et al.*, for a writ of certiorari, and that of the Secretary of Agriculture in No. 1076, should be denied. The *amicus curiae* is of the respectful opinion that the petition of Russell Allen, *et. al.*,

for a petition for a writ of certiorari in No. 874 should be granted, and the *amicus curiae* hereby adopts the questions presented for review as set forth in the latter petition and in the briefs in opposition to the petitions in Nos. 861 and 1076, respectively. The jursidictional prerequisites and relevant facts are set forth in the aforesaid petition in No. 874 and in the opposing briefs in Nos. 861 and 1076.

INTEREST OF THE AMICUS CURIAE

The importance of the dairy industry to the people of the State of Vermont cannot be exaggerated. Approximately 60 percent of the people of this State live in rural areas. *34th Biennial Report of the Commissioner Of Agriculture of the State of Vermont,* 1967-68, p.9. As noted in said Report, "The economic climate for our agricultural community should be of concern to all Vermonters and also non-Vermonters." *Ibid.* The sale of all agricultural commodities by Vermont farmers amounted to approximately $131,527,000 in 1967, and of this total, income from the sale of fluid milk and surplus dairy livestock was reported to be $109,664,000.[1] It is readily apparent that the facts warrant the statement in the Commissioner's Report that, "The dairy industry still dominates our agricultural scene, producing approximately 83.6 percent of the receipts." As noted by the Commissioner of Agriculture; "No other state is specialized to this degree in one type of agriculture." (*Statement of Robert Brannon,* Milk Hearings, Washington, D.C., Nov. 1966).

Not only is the Vermont agricultural economy specialized; the dairy industry itself is highly dependent upon non-nearby milk, eighty percent of Vermont's dairy production going to the Massachusetts-Rhode Island market.

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[1] *Massachusetts-Rhode Island Monthly Milk Market Statistics,* Jan.-Dec., 1968, prepared by Market Administrator, Order No. 1.

In 1968, on a twelve-month average, there were 4,136 Vermont producers supplying that market. This compares to only 1,603 in Massachusetts, a much larger State.[2] In 1968, Vermont producers supplied 1,649,300,000 pounds of milk to this market as compared to 496,692,000 pounds supplied by Massachusetts, the third largest producer.[3] Vermont therefore supplied 47.9 percent of the total milk supplied in the Massachusetts-Rhode Island market in 1968. Of the number of producers in this market, 47.8 percent were Vermonters.[4]

Serious difficulties beset the modern Vermont dairy industry. A recent research report lists among its significant findings the fact that dairy herds in Vermont have dropped greatly and that cow numbers have also dropped in the thirteen years covered by this report.[5] That report contains an alarming introduction:

> "Until recent years the annual change in total number of cows on farms in Vermont was slight. In 1900 there were approximately 270,000 cows on farms. At the end of World War II there were approximately 273,000 cows.
>
> In the ten year period between 1953 and 1963 cow numbers dropped to a new low of 247,000. Since 1963 cow numbers have steadily declined. From 1963 to 1964 the decrease was 9,000 cows; from 1964 to 1965 another 8,000 cows. But the greatest drop—24,000 cows—occurred between 1965 and 1966. With just under 206,000 cows on Vermont farms April 1, 1966, the lowest point in cow numbers for any period in the Twentieth Century was reached.

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[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Research Report of the Vermont Agric. Exper. Stat.*, Univ. of Vt., (July, 1967); and see Report dated August, 1968.

> * * * In the decade between 1953 and 1963, three thousand six hundred farms ceased to house dairy herds. Between 1963 and 1964 approximately five hundred farms went out of the dairy business; and between 1964 and 1965 another five hundred. The rate of loss increased substantially between 1965 and 1966 when the number of dairy farms discontinued in the one year rose to approximately eight hundred."

Such a situation in a state where dairy farming has the importance that it has in Vermont is indeed alarming. A comparison of ring test activity between 1965 and 1966 confirms the severity of the decline in dairy herds. In March of 1965, there were 6,030 herds on the ring test; on June 1, 1966, there were 5,059, approximately a sixteen per cent decline. In June, 1967, there were 4,681 herds, and the number had decreased to 4,666 herds in July, 1968. As of January, 1969, the figure had been lowered to 4,484 herds. Furthermore, this decline was not limited to the small so-called inefficient operator. During this period many medium and large size dairies discontinued operation. *Biennial Report of the Commissioner of Agriculture of the State of Vermont* (1965-68).

This critical decline in the number of herds and the total number of cows has begun to affect production. *The Biennial Report of the Vermont Commissioner of Agriculture* recognizes "one of the most significant trends in the dairy industry", during the period 1965 to 1966, to be "the reduction in production which began in the early fall of 1965. The decline in the number of dairy farms which in general reflects the economic forces at work in our economy–namely, the technological revolution and price-cost squeeze, finally resulted in a sufficient number of farmers discontinuing dairying to result in a decline of total output. Up to this point, although we have had a continuing decline in the number of dairy

farms, production had continued to increase". (*33rd Biennial Report of the Commissioner of Agriculture of the State of Vermont* (1965-1966) page 5.). In view of the importance of Vermont producers to the Massachusetts-Rhode Island milk market, this decline in production cannot help but alarm consumers in the entire milkshed. Statistics reveal a declining number of Vermont producers supplying that milk market. In January, 1965, there were 5,437 such Vermont producers. In December, 1965, this number had decreased to 4,677, representing a decrease of 760 Vermont producers. *Massachusetts-Rhode Island Milk Market Statistics* (August 1966). The decline continued in 1966. In January of 1966, there were 4,588 Vermont producers in that milkshed. In December of 1966, this number had declined to 4,255 representing a total decline in the year 1966 of 333 Vermont producers. In December, 1967, the number of Vermont producers declined to 4,183, and this number was lowered to 4,021 as of December, 1968. *Massachusetts-Rhode Island Milk Market Statistics.*

The present Commissioner of Agriculture has noted that "The Vermont dairy industry in in serious difficulty at the present time". (*Statement of Robert J. Branon, Milk Hearings,* Washington, D.C., Nov., 1966). These difficulties are of great concern to the people of the State of Vermont. In view of the importance of the Vermont dairy industry to all of New England, they are also matters of great concern to the entire New England area.

All but 57 Vermont dairymen who serve the Federal order are required by the operations and provisions of the milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive in the absence of the provision. *Blair v. Freeman,* 370 F.2d 299 (D.C. Cir. 1966). In 1966, there were 1,594,780,000 pounds

of Vermont milk in the Massachusetts-Rhode Island milk market produced by approximately 4,400 Vermont farmers. The cost of the farm location differential to so-called distant producers is at least twelve cents per hundredweight. (See the *Market Administrator's Review, Volume 19, No. 1,* page 1 (Jan. 1967). Therefore, the total cost of the differential to the Vermont dairy industry in 1966 was $1,913,736.00. The average cost to each Vermont farm in the Massachusetts-Rhode Island market was $435.00. In 1967, the total cost to Vermont producers was $1,809,017.00 or approximately $416 per producer. A similar amount was paid under the differential in 1968, amounting to at least $427 per Vermont producer.

This discrimination is unwarranted, both in fact and by law. If the farm location differential had any validity when instituted many years ago, the reason has long since disappeared with the advent of the bulk tank, uniform dairy standards and modern transportation.

ARGUMENT

THERE IS NO CONFLICT IN CIRCUITS OR IMPORTANT UNSETTLED FEDERAL QUESTION.

The core of the congressional program contained in the Agricultural Marketing Agreement Act was a uniform minimum price for producers that did not turn on or vary with the nature of use for which the producer was able to dispose of his milk. 7 U.S.C.A. 608c (a)(B)(i). As the Court below has recognized, the rationale of the Secretary of Agriculture for the farm location differential is the use for which the nearby producer was historically able to dispose of his milk. This approach is not only without authorization in the statute, but "on the contrary was exactly the approach that Congress had intended to prohibit". *Blair v. Freeman,* 370 F.2d 299, 338 (D.C. Cir. 1966).

A close reading of the language in the opinion handed down in *Green Valley Creamery, Inc. v. United States,* 108 F.2d 342 (1st Cir. 1939), reveals that the alleged approval of farm location differentials was at best nothing more than dictum. Furthermore, the Court in *Green Valley* "presumed" that nearby producers would deliver to handlers near the market; that presumption was dubious in 1939[6] and is completely unwarranted today because of the bulk tank and greatly improved transportation.

This Court's decision in *United States v. Rock Royal,* 307 U.S. 533 (1939), is not in conflict with the decision below, and the lower court was obviously correct in stating that only *handlers* and a different section of the Act was involved in the *Rock Royal* case. The nearby differential mentioned in *Rock Royal* was also based on *delivery* to a *plant* in the marketing area of the old New York milk order, and the Secretary has provided for such a differential in the zone differential of the Mass.-Rhode Island milk order. The court below was clearly correct in holding that the differential could not be based on the location of the farm, and such a criterion would bar other producers from ever acquiring a differential of that nature. This Court also noted in *Rock Royal* that any difference in price based upon use of milk would be in direct violation of the Act, and the *amicus curiae* respectfully submits that the holding of the court below is in agreement with the decision of this Court.

The *Cranston* case cited by the petioners is a district court decision which will be reversed on appeal, and the operation of that order's nearby differential clearly shows the discriminatory operation of such a provision. It causes severe economic injury to non-nearby producers without any countervailing benefit in returns under the differential to Connecticut producers. The *Cranston*

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[6] See Joint Appendix, p. 75, filed herein, containing testimony from Dec. 10-12, 1935 Hearing for 1936 Greater Boston milk order.

decision appears to be in conflict with its own Circuit on principle, and the decision there rests on an interpretative approach that is clearly unnecessary and unsound.

The Secretary failed to petition this Court for certiorari in the *Blair* case, and he admitted in that case that the nearby differential was identical to the nearby differential involved in this case and based on very similar findings. Dairy farmers have relied on that refusal to seek review in this Court, and it is respectfully suggested that the forced relitigation of this issue is against the public interest under such circumstances.

The farm location differentials are discriminatory on their face. They are not authorized by the Agricultural Marketing Agreement Act and, in fact, tend to frustrate the principal purpose of that act: the assurance of a uniform minimum price for milk without regard to the use to which the milk sold is ultimately put. They are detrimental to the dairy industry, to the economy of the State of Vermont and to the milk consumers of the New England States:

> "Dairy farms are being liquidated at a rate which threatens the future of our dairy industry. Vermont is a principal dairy area of New England, supplying a major portion of the high quality, fresh fluid milk in the Massachusetts-Rhode Island area for the past thirty years. Continuation of the current situation is a serious threat to the people living in metropolitan areas which we supply."[7]

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[7] Statement of Robert J. Branon, Commissioner of the Vermont State Department of Agriculture, Milk Hearings, Washington, D.C., April 14, 1967.

CONCLUSION

The petitions in Nos. 861 and 1076 for a writ of certiorari should be denied. The petition of Russell Allen, *et al.*, in No. 874 for a writ of certiorari should be granted.

Respectfully submitted,

JAMES M. JEFFORDS
Attorney General of the
State of Vermont
Amicus Curiae.

March, 1969